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No. 83-2032

In the Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

BERNARDO RIOS-PINEDA
AND
ESTARNILADA RIOS-PINEDA DE RIOS
RESPONDENTS

Response to:

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Roman de la Campa
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ATTORNEY FOR RESPONDENTS

QUESTIONS PRESENTED

1. Whether the Attorney General and his delegates have the authority to improperly deny Petitioners' motion to reopen deportation proceedings after the United States Court of Appeals for the Eighth Circuit has remanded this case to the B.I.A. on 3/12/82 with specific directions as follows:

> "We caution the Board to give careful and thorough consideration to the motion to reopen..."[1]

2. If the Supreme Court of the United States has jurisdiction under 28 U.S.C. 1254(1) to decide on a Writ of Certiorari filed in this court on June 11, 1984 to review an order of the United States Court of Appeals for the Eighth Circuit (Case No. 80-1619) dated March 12, 1982.

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[1] See, E.g., Pravat v. INS, 662 F.2d 561 (9th Cir. 1981)(per Curiam).

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

No. 83-2032

Immigration and Naturalization Service,

Petitioner

v.

Bernardo Rios-Pineda

and

Estarnilada Rios-Pineda de Rios,

Respondents

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certoirari to review the judgments of the United States Court of Appeals for the Eighth Circuit in this case, which are:

1. The opinion of the United States Court of Appeals for the Eighth Circuit. (Case No. 80-1619) Initial opinion filed on March 12, 1982. (Petitioner's Appen-

dix C)

2. The opinion of the United States Court of Appeals for the Eighth Circuit. (Case No. 82-1892) Ancillary opinion filed on November 9, 1983 (Petitioner's Appendix A)

OBJECTION TO JURISDICTION OF THE COURT

Respondents object to the jurisdiction of the Court to grant the writ of certiorari on the basis that the petition is jurisdictionally out of time with regard to the initial opinion of the United States Court of Appeals for the Eighth Circuit (Judgment entered on March 12, 1982) to the question presented in the petition (page 1), which was decided totally in the initial opinion of the Court.[2]

[2] "Whether the Attorney General and his delegates have discretion to deny an alien's motion to reopen deportation proceedings for the purpose of seeking suspension of deportation under 8 U.S.C. 1254 (a)(1) because the alien has acquired the necessary seven years "continuous physical presence"only by filing frivolous appeals and has in other ways exhibited disregard for the immigration laws."

Certainly, the petition was timely filed against the second opinion of the United States Court of Appeals for the Eighth Circuit (Case No. 82-1982 opinion filed on November 9, 1983). However, the issue raised by the petitioner in the "Question Presented" for writ of certoirari was not decided in this second ancillary opinion.[3]

STATUTE AND REGULATION INVOLVED

The mandate of the U.S. Court of Appeal's, Case No. 80-1619, initial opinion filed on March 12, 1982, which provides

[3] "In short, we find that the Board abused the discretion which remained after our remand of the case by refusing to give the petitioners a full and fair opportunity to present their evidence of extreme hardship and failing to render a reasoned decision based upon that evidence. The Board was not free to reconsider the prima facie issue, and it abused the Attorney General's discretion in denying the pet-

in the pertinent part that:

"Here, Bernardo and Estarnilada have been physically present in the United States continuously since May 1, 1974. Our review of the record indicates that Bernardo, in addition to being a homeowner in Omaha, has been gainfully employed at Union Packing since May of 1974. Both of Bernardo and Estarnilada's children, Ana Belia and Brenda Lee, were born in Omaha and have resided there since birth.

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itioners' motion regardless of th r prima facie showing. We do not question the Board's sincerity in attempting to implement the immigration policy which languishes in our federal statutes. We do require that policy be followed to the letter and in a spirit of total fiarness to those persons who may be permantly exiled from our shores as a result of its implementation. We therefore remand to the Board with directions that it reopen the petitioners' deportation proceedings, with a full hearing before an immigration judge if requested, in order to make a reasoned determination of their eligibility for a section 1254(a)(1) suspension of deportation by virtue of the resultant extreme

In Vargas-González v. INS, 647 F.2d 457 (5th Cir 1981), the Fifth Circuit reversed a deportation decision by the Board of Immigration Appeals and remanded the proceeding so that the Board could consider the petitioner's eligibility for suspension of deportation because the seven-year continuous presence requirement under § 1254(a)(1) had been established during the pendency of the appeal. Id. at 458-459. The Court observed that the petitioner, having met the seven-year continuous presence requirement, established--'a prima facie case entitling him upon proper procedural application to reopen the case for reconsideration of his application for suspension of deportation.' Id. at 459,.

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hardship to themselves or either of their daughters, Ana Belia or Brenda Lee."

We conclude that Bernardo and Estarnilada, like the petitioner in Vargas-González v. INS, have 'made a substantial showing that the Board should properly aford (them) relief on the basis of the additional evidence available subsequent to the initial hearing.***' Id. We accordingly reverse the Board's decision and remand for further proceedings.

III

In remanding this case to the Board for further proceedings, we direct the Board to hold this matter in abeyance for sixty days from the date of this decision. If Bernardo and Estarnilada file a proper motion to reopen within the sixty-day period, the Board shall promptly consider and rule upon their claim that they are entitled to suspension of deportation under 8 U.S.C. § 1254(a)(1). If no

motion to reopen is filed within sixty days, the Board may dismiss this matter.

Reversed and remanded."

STATEMENT

1. Petitioner did not comply with the laws applicable in this case (U. S. Court of Appeals for the Eighth Circuit, Case No. 80-1619). On the contrary, Petitioner entered a decision (See Petitioner's Appendix B)in which the B.I.A. stood up in an argument with the mandate they were supposed to obey.

Respondents, following the mandate of the U.S. Court of Appeals, filed timely a motion to reopen. (See Appendix A)

Petitioner disobeyed the mandate, provoking Respondents to file a second Petition to Review before the U.S. Court of Appeals for the Eighth Circuit, in which occassion it was raised to the U.S. Court

of Appeals how the B.I.A. totally ignored their previous mandate, the Board deciding, in open argument against the Court and without granting a hearing to discuss and decide the motion to reopen of the Respondents.

2. This Petition for a Writ of Certiorari is built upon a misrepresentation, which is that the points expressed in the Statement of the Petition were decided by the Court of Appeals for the Eighth Circuit in Case No. 82-1892, when they were not decided at that time. The facts were all decided by the mandate of the U.S. Court of Appeals for the Eighth Circuit in the Case No. 80-1619, which was consented to by the Petitioners.

3. This Petition for Writ of Certiorari is, therefore, jurisdictionally out of time with regard to the Statement of the Petition.

4. If the practice followed in this

Petition was accepted, it would imply that the flagrant denial of the mandate of the U.S. Court of Appeals for the Eighth Circuit by the Petitioner will originate a second court decision, which will correct Petitioner's failure of having consented to the first decision of the Court of Appeals among the same parties.

Petitioners could file a Petition for a Writ of Certiorari against the first mandate of the U.S. Court of Appeals for the Eighth Circuit but decided not to do it. Therefore, they have lost any further opportunity to do it as they are attempting to do through the bridge of the second opinion of the Court.

REASONS FOR DENYING THE PETITION

Since the Petitioner did not file this Petition timely against the first opinion of the U.S. Court of Appeals for the Eighth Circuit, the matters decided are "res jud-

icata."

This case was before the B.I.A. on remand from a mandate of the Eighth Circuit Court of Appeals dated March 12, 1982, ordering the Board to allow the Respondents 60 days in which to properly file a motion to reopen to apply for suspension of deportation. The Respondents submitted a motion to reopen. The motion was denied by the Board's Order of May 30th., without a hearing.

In a decision dated 12-12-73, the Immigration Judge found the Respondents deportable on their own admissions to having entered without inspection on May 1, 1974. He further refused to accept the male respondent's application for suspension of deportation for failure to establish 7 years of continuous physical presence, and denied both Respondents' requests for voluntary departure in the exercise of discretion. Respondents' appeal

was dismissed by the Board on May 30, 1980. Respondents filed a Petition for Review on July 16, 1980. The Court of Appeals for the Eighth Circuit remanded the record because the Respondents acquired 7 years of physical presence during the pendancy of the case.

Respondents, in compliance with the Court's mandate, filed a motion to reopen simultaneously before the District Director in Omaha, Nebraska, the U.S. Immigration Judge in Denver, Colorado, and the U.S. Board of Immigration Appeals in Washington, D.C. by certified mail on 5-6-82. Respondents made the simultaneous filing at these three different offices upon the doubt that the interpretation of the Board would be according with 8 C.F.R. 3.8(b). However, the Order of the U.S. Court of Appeals for the Eighth Circuit was that the motion to reopen was filed before the Board. Facing that doubt, the most cons-

ervative criteria was to proceed to file the motion to reopen at the three indicated places, timely in each of them, that is May 6, 1982.

The B.I.A., without a hearing, decided the motion on the grounds of technicality entered in areas of anaylsis of Respondents' hardship, as well as Respondents' statutory time for suspension of deportation. In as much as these two elements were perfectly clarified in the U.S. Court of Appeals' mandate on 3-12-82, we conclude that the B.I.A. was in flagrant opposition and resistance to the mandate of the U.S. Court of Appeals for the Eighth Circuit.

According with § 242.22 of the Code of Federal Regulations, Title 8, [4] the B.I.A.,

[4] "Except as otherwise provided in this section, a motion to reopen or reconsider sahll be subject to the requirements of § 103,5 of this chapter. The Immigration judge may upon his/her own motion, or upon motion of the trial attorney or the respondent, reopen or reconsider any case in which he/she had made a decision, unless jurisdiction in the case is vested in the

in compliance with the mandate of the Court of Appeals, was forced to hold a hearing in which the Respondents would have the right to introduce evidence to support their motion and to submit arguments and

Board of Immigration Appeals under Part 3 of this chapter. An order by the Immigration judge granting a motion to reopen may be made on Form I-328. A motion to reopen will not be granted unless the immigration judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing; nor will any motion to reopen for the purpose of providing the respondent with an opportunity to make an application under § 242.17 be granted it respondent's right to make such application was fully explained him/her by the immigration judge and he/she was afforded an opportunity to do so at the hearing, unless circumstances have arisen thereafter on the basis of which the request is being made. The filing of an application for adjustment of status under section 245 of the Act may be considered as a motion to reopen when the application shows new material not available or discoverable at the time of the deportation hearing. The filing of a motion under this section with an immigration judge shall not serve to stay the execution of an outstanding decision; execution shall proceed unless the immigration judge who has jurisdiction over the motion specifically grants a stay of deportation. The immigration judge may stay deportation

brief. The B.I.A., ignoring this regulation, decided upon the motion without that hearing and, therefore, in flagrant violation of the law.

According with the Order of the U.S. Court of Appeals for the Eighth Circuit, the Respondents were granted 60 days from 3-12-82, to file a proper motion to the Board in accordance with the controlling regulations, which the U.S. Court of Appeals noted to be 8 C.F.R. 3.2 and 8 C.F.R. 3.8.

Respondents properly and timely filed a motion to reopen and for suspension of deportation, which the Board denied on 7-16-82 by a majority, (Board member James p. Morris abstained from consideration of this case) without a careful and thorough

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pending his/her determination of the motion and also pending the taking and disposition of an appeal from such determination."

(46 FR 25598, May 8, 1981)

consideration. Copy of said motion to reopen is attached as Appendix A.

The U.S. Court of Appeals for the Eighth Circuit, in its decision in Case No. 80-1619, entered on 3-12-82, determined that Respondents' specifically are persons who completed the 7 years continuous physical presence in this country during the pendency of this case; justly based that in completion of this requirement, their case should be reopened by the B.I.A.

However, the B.I.A. denied the motion to reopen its decision of 5-30-80 on the grounds that Mr. and Mrs. Rios-Pineda's case did not warrent any consideration upon the fact that they have completed the 7 year time requirement of physical presence while pendency of the judicial review of their case.

The Board's decision makes little sense and is improper, in as much as it is punishing the aliens for the reason

that they have exercised their Constitutional rights of equal protection under the law.[5]

Again, the B.I.A. has disregarded the opinion of the U.S. Court of Appeals for the Eighth Circuit, expressed in the Order entred on 3-12-82, Case No. 80-1619, in as much as said decision specifically weighed the equitable factor which entitled the aliens in this case with the requirement of extreme hardship, which are: the fact that the Rios-Pineda family included 2 school-age American citizen children who would be in fact deported if their parents were deported. Consequently, those 2 American citizen children will be forced to discontinue their education at the level offered in their country, with the discontinuance of the study in the read-

[5] Sida v. INS, 665 F.2d 851 (9th Cir. 1981), Santana-Figueroa v. INS, 644, 1354, 1357 (9th Cir. 1981), Pérez v. INS, 643 F.2d 640, 641(9th Cir. 1981)

ing and writing of their official English language and will be forced to lose the health and welfare protections to which they are entitled but not available in their parents' country of Mexico. Moreover, the psychological impact and cultural difference to Ana Belia (10 years old) and Brenda Lee (6 years old), if transplanted at their ages to a country totally unknown by them, will be a case of extreme hardship.

Specifically, the U.S. Court of Appeals for the Eighth Circuit, in its decision of 3-12-82, Case No. 80-1619, stated:

> "Here, Bernardo and Estarnilada have been physically present in the United States continuously since May 1, 1974. Our review of the record indicates that Bernardo, in addition to being a home owner in Omaha, has been gainfully employed at Union Packing since May of 1974. Both of

Bernardo and Estarnilada's children, Ana Belia and Brenda Lee, were born in Omaha and have resided there since birth."

Respondents, to prove the extreme hardship of Mr. and Mrs. Rios-Pineda's American citizen children, introduced to the B.I.A. the following evidence:

1. Birth Certificate of Ana Belia in Omaha, Nebraska.

2. Birth Certificate of Brenda Lee in Omaha, Nebraska.

3. Report cards from the Omaha Public Schools regarding Ana Belia and Brenda Lee Rios.

The B.I.A. in their decision of 7-16-82 specifically recognized the evidential elements introduced with the motion to reopen by Respondents, however they concluded that the extreme hardship does not exist in this case with abuse of discretion.[6]

CONCLUSION

The Respondents herein oppose this Petition for a Writ of Certiorari on the basis that the Petitioner is jurisdictionally out of time plus the additional arguments expressed herein. Therefore it is respectfully requested that the writ be rejected without entering in its merits.

Respectfully submitted.

F. Román de la Campa

Román de la Campa
Attorney for Respondent

November 1984

[6] Sida v. INS, 665 F.d2 851 (9th Cir. 1981), Tong-Chen v. Attorney General, F. Supp, DDC, C.A. No. 82-0010, Aug. 13, 1982.

APPENDIX A

TO THE BOARD OF IMMIGRATION APPEALS

Bernardo Rios-Pineda, A22 733 395, husband, and Estarnilada Ramos de Rios, A22 733 397, wife, Petitioners.	*	MOTION TO RE-OPEN & CLAIM FOR SUSPENSION OF DEPORTATION

Submitted: By certified mail May 6, 1982

According with the decision of the United States Court of Appeals for the Eighth Circuit in Case No. 80-1619, filed March 12, 1982, Petitioners herein expresses to the Board as follows:

1. That in compliance with the decision above-expressed and during the 60 days period allowed by the Court, Petitioners herein file this "Motion to Reopen" this case upon the following facts:

(a) Because the 7 years statutory requirement to qualify for Suspension of Deportation pursuant to 8 U.S.C. 1254(a), which had not have e.apsed when the orig-

inal decision was entered by the Immigration Judge, the Honorable Jesse M. Sellers, on August 29, 1980. (see exhibit #1 attached), has elapsed at the time of the filing of this Motion, that is, May 7, 1982 (see exhibit #2 attached).

In effect, on page 2 of the decision above-expressed of the U.S. Court of Appeals, (see exhibit #3), Petitioners entered on May 1, 1974, in the United States. Since that time they have been continuously residing in the U.S. Therefore the 7 years statutory requirement is the new fact in which Petitioners base this Motion to Reopen.

(b) Considering the other requirements of the law, it is hereby added that Petitioners are persons of immaculate conduct, moral character and work records. Please see exhibits attached to 2, that is: statement of employer, income tax returns

1974, 75, 76, 77, 78, 80 and 81, plus the real estate contract purchasing petitioners' homestead.

(c) Finally, the extreme hardship that Petitioners' only 2 U.S. citizen children will suffer is coorborated by exhibits attached to exhibit 2, they are: birth certificates of Ana Belia (7) and Brenda Lee(3) both born and raised in Omaha, Nebraska, never having visited any other country. The oldest girl Ana Belia with her education in U.S. schools only (see Attached school report in exhibit 2).

In effect Ana Belia Rios and Brenda Lee Rios will suffer extreme hardship if their parents are deported, because, due to their ages (7 and 3 years old) will not be reasonable to stay alone in this country separated from their parents. Deporting with their parents will deprive them of their citizen rights, which among other things to receive their education in Am-

erican schools, which in the case of Ana Belia who has already 3 years in American schools, will be to interrupt said education, only in the English language, then going to re-start their education in Mexican schools in the Spanish language, retarding her educational process at a very critical time.

Moreover, the extreme hardship of Petitioners will be also psychological, when cosidering their inability to enjoy in Mexico the standards they have in 8 years of their life in the United States, according with their financial possibilities as well as their low skills and educations. This psychological effect will be worse in the petitioners' two U.S. citizen minor daughters who will be deprived of all social assistance which they might utilize if needed from the United States, if they were living in their country.

Moreover, neither the Immigration

Judge, nor this Board, in the decision of this case have objected to these other requirements regarding moral character and extreme hardship.

3. Finally, the decision of the U.S. Court of Appeals, in this case (see copy attached) in the following paragraph which we are quoting, by implication, is accepting that petitioners' hardship is extreme, by saying:

"Here, Bernardo and Estarnilada have been physically present in the United States continuously since May 1, 1974. Our review of the record indicates that Bernardo, in addition to being a homeowner in Omaha, has been gainfully employed at Union Packing since May of 1974, Both of Bernardo and Estarnilada's children, Ana Belia and Brenda Lee, were born in Omaha and have resided there since birth."

THEREFORE, petitioners request that

the Board gives consideration to this motion to reopen with exhibits, and fees, ordering that petitioners are entitled to suspension of deportation under 8 U.S.C. 1254(a)(1).

Respectfully submitted,

/s/Roman de la Campa
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APPENDIX B

NO. 82-1894

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BERNARDO RIOS-PINEDA
ESTARNILADA RIOS-PINEDA

PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

RESPONDENT

PETITION FOR REVIEW OF ORDER OF THE
BOARD OF IMMIGRATION APPEALS.

BRIEF FOR PETITIONERS

STATEMENT OF THE ISSUE

Was the Board of Immigration Appeals acting properly when disobeying the Order of this Court by improperly denying the Motion to Reopen filed by Petitioners?

STATEMENT OF THE CASE

This case was before the Board of Immigration Appeals (BIA) on remand from a decision of the Eighth Circuit Court of Appeals dated March 12, 1982, ordering the Board to allow the Petitioners 60 days in which to properly file a Motion to Reopen. The Motion was denied and the Board's Order of May 30, 1980 was reaffirmed.

In a decision dated December 12, 1978, the Immigration Judge found the Petitioners deportable on their own admissions to having entered without inspection on May 1, 1974. He further refused to accept the male petitioner's application for suspension of deportation for failure to establish 7 years of continuous physical presence, and denied both Petitioners' requests for voluntary departure in the exercise of discretion. An appeal from Petitioners was dismissed by the Board on May 30, 1980. The Board remanded the record

because the Petitioners acquired 7 years of physical presence during the pendency of the appeal.

Petitioners by Certified Mail on May 6, 1982 filed a Motion to Reopen simultaneously before the District Director in Omaha, Nebraska, the U.S. Board of Immigration Appeals in Washington, D.C. and the U.S. Immigration Judge in Denver Colorado. Petitioners made the simultaneous filing at these three different offices upon the doubt that the interpretation of the Board would be according with the 8 C.F.R. 3.8 (b). However, the Order of the Court was that the Motion to Reopen was filed before the Board. In front of that doubt, the most conservative criteria was to proceed to file the Petition to Reopen at the three indicated places, timely in each of them, that is May 6, 1982.

The Board of Immigration Appeals, of course, knowing that the grounds of tech-

nicality in the formality of the Motion were not solid to base their negative decision, decided also in areas of the analysis of Petitioners' statutory time for suspension of deportation. In as much as these two elements were perfectly decided by this Court in their Order of March 12, 1982, we conclude that the Board of Immigration Appeals is in flagrant opposition and resistance to the Order of this Court, previously mentioned.

STATEMENT OF THE FACTS

The male petitioner is a 30-year old native and citizen of Mexico. A deportation proceedings, he testified that he first entered the United States in the summer of 1972, but his suspension application states that he left the United States in March, 1974 pursuant to an administrative grant of voluntary departure and returned on May 1, 1974. The female

petitioner is a 33-year old native and citizen of Mexico who entered the United States on May 1, 1974, with her husband. The Petitioners have two United States citizen children born November 3, 1974 and February 9, 1979.

According with the Order of this Court, the Petitioners were granted 60 days from March 12, 1982, to file a proper motion to the Board in accordance with the controlling regulations which the Court noted to be 8 C.F.R. 3.2 and 8 C.F.R. 3.8.

Petitioners properly and timely filed the Motion to Reopen and for Suspension of Deportation which the Board denied on July 16, 1982 by a majority, Board member James P. Morris has abstained from consideration of this case.

The Motion was denied by the Board of Immigration Appeals without a previous hearing.

-ARGUMENT-

I. MOTION TO REOPEN WAS PROPERLY FILED.

On May 6, 1982, Petitioners in compliance with the Order of this Court entered in March 12, 1982 in 80-1619 among these same parties, simultaneously filed the same Motion to Reopen in the following three different places:

1. In the office of the Board of Immigration Appeals in Falls Chruch, Virginia, 22041.

2. In the office of the District Director of the Immigration and Naturalization Service in Omaha, Nebraska, 68102.

3. In the office of the U.S. Immigration Judge in Denver, Colorado, 80202.

This conservative approach by filing the same Petition in those three differ-

ent offices at the same time was directed to prevent the possibility of denial of the Petition for the fact that it was not properly filed in the office pertinent in this case.

Therefore, the opinion of the Board regarding the place and time for the filing of this Motion must be reviewed by this Court upon consideration of the effective filing of the Motion regarding time and place.

Copy of said Motion to Reopen is hereby attached as Exhibit 1.

II. MR. AND MRS. RIOS-PINEDA HAVE MET ALL THE STATUTORY REQUIREMENTS OF GOOD MORAL CHARACTER, SEVEN YEARS OF CONTINUAL, PHYSICAL PRESENCE IN THE U.S. AND EXTREME HARDSHIP.

This Court, by its decision in Case No. 80-1619 entered, March 12, 1982 determined that appellants' specifically are persons who completed the seven years continuous physical presence in this country

during the pendency of this case; just based in that completion of this requirement, their case should be reopened by the BIA.

However, the BIA denied the motion to reopen by its decision of May 30, 1980. On the grounds that Mr. and Mrs. Rios-Pineda's case did not warrant any consideration upon the fact that they have completed the seven year time requirement of physical presence while pendency of the judicial review of their case.

The Board's decision makes little sense and is improper, is as much as it is punishing the aliens for the reason that they have exercised their constitutional rights of equal protection of the law. Sida v. INS, 665 F.2d 851 (9th Cir. 1981), Santana-Figueroa v. INS, 644 F.2d 1354, 1357 (9th Cir. 1981), Perez v. INS, 643 F.2d 640, 641 (9th Cir. 1981).

III. THE BOARD HAS DENIED APPELLANTS' MOTION TO REOPEN FOR THE REASON THAT THEY HAVE NOT PROVEN THE STATUTORY REQUIREMENT OF EXTREME HARDSHIP.

Again, the BIA has disregarded the opinion of thic court expressed in the Order entered March 12, 1982, Case No. 80-1619, in as much as said decision specifically weighed the equitable factor which entitled the aliens in this case with the requirement of extreme hardship, which are: the fact that the Rios-Pineda family included two school age American children who would be in fact deported if their parents were deported. Consequently, those two American children will be forced to discontinue their education at the level offered in their country, with the discontinuance of the study of their official English language and will be forced to loose the health and welfare protections to which they are entitled but not available in their parents' coun-

try of Mexico. Moreover, the psychological impact and cultural difference when Ana Belia (9 years old) and Brenda Lee (6 years old), be transplanted at their ages to a country totally unknown for them, will be a case of extreme hardship.

Specifically, this court in its decision of March 12, Case No. 80-1619, states as follows:

> "Here, Bernardo and Estarnilada have been physically present in the United States continuously since May 1, 1974. Our review of the record indicates that Bernardo, in addition to being a homeowner in Omaha, has been gainfully employed at Union Packing since May of 1974. Both of Bernardo and Estarnilada's children, Ana Belia and Brenda Lee, were born in Omaha and have resided there since birth."

Appellants, to prove the extreme hardship to Mr. and Mrs. Rios' American children, intorduced to the BIA as evidence the following:

1. Birth Certificate of Ana Belia in Omaha, Nebraska.
2. Birth Certificate of Brenda Lee in Omaha, Nebraska.
3. Report card from the Omaha Public school regarding Ana Belia and Brenda Lee Rios.

The BIA in the appealed decision of July 16, 1982 specifically recognized the evidential elements introduced with the motion to reopen by appellants, however concluded that the extreme hardship does not exist in this case with abuse of discretion. Sida v. INS, 665 F.2d 851 (9th Cir. 1981) Tong-Chen v. Attorney General F. Supp. DDC., C.A. No. 82-0010, August 13, 1982.

CONCLUSION

The decision entered in this case by the BIA in denying the motion to re-open, filed by appellant is in violation of 8 U.S.C. Section 1254 (a)(1) and therefore was improperly denied. The motion was timely filed, following the order of this court in Case No. 80-1619, upon the grounds that appellants, Mr. and Mrs. Rios-Pineda and their two children, Ana Belia and Brenda Lee, are persons of good moral character. Mr. and Mrs. Rios-Pineda have been in the country continuously present without interruption for seven years and their American children will be suffering a notorious extreme hardship if they are transplanted to an unknown country with a different educational, cultural level, with lower standards in life condition and with psychological impact of said transplantation at their particular ages.

Respsctfully submitted,

Román de la Campa

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